89-1327

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO.

**IN THE SUPREME COURT
OF THE UNITED STATES**

PEDRO RAMOS,

Petitioner

versus

BETHLEHEM STEEL CORP.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT AN EMPLOYER CAN PREVAIL O A RACE/NATIONAL ORIGIN DISCRIMINATION CASE UNDER TITLE VII ON SUMMARY JUDGMENT ALLEGING BUSINESS JUSTIFICATION WHERE THE EVIDENCE INDICATES THAT A FLAGRANT RACIST MADE THE DECISIONS TO DEMOTE THE AGGRIEVED EMPLOYEE, AND THAT THE FLAGRANT RACIST OFTEN ON THE JOB CALLED AFRICAN AMERICANS "NIGGERS" AND HISPANICS "SPICS"?

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IN THE SUPREME COURT
OF THE UNITED STATES

NO.

PEDRO RAMOS,
Petitioner

versus

BETHLEHEM STEEL CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Pedro Ramos, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit dated November 28, 1989 is unpublished and appears at page of the Appendix herein.

The Order of the United STates Court of Appeals For Third Circuit dated October 30, 1989 is unpublished and appears at page of the Appendix herein.

The Order and Memorandum of the United States District Court for the Eastern District of Pennsylvania, dated May 17, 1989, is unpublished and appears at page of the Appendix herein.

JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit dated November 28, 1989 is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Court.

FEDERAL PROVISIONS INVOLVED

"It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segrate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Civil Rights Act of 1964, effective 7/3/64. U.S. C. Section 2000e-2(a).

STATEMENT OF THE CASE

a) Procedural History

On April 14, 1986, Petitioner, Pedro Ramos, an Hispanic male, filed a Complaint against Respondent seeking damages incurred as a result of Respondent's arbitrary and discriminatory demotion of Petitioner based upon his national origin.

Respondent filed a First Motion For Summary Judgment. On November 18, 1986, the trial court denied Respondent's First Summary Judgment motion.

An arbitration hearing occurred on March 19, 1987, April 13, 1987, and July 21, 1987. On July 21, 1987, the arbitrators entered an order in favor of Respondent. On August 19, 1987, Petitioner filed a demand for trial de novo.

Respondent moved for summary judgment a second time. On May 17, 1989, the District Court granted Respondent's second

motion for summary judgment. Petitioner timely appealed the grant of summary judgment to the United States Court of Appeals for Third Circuit which upheld the trial court. Petitioner filed a Petition For Rehearing which the Third Circuit denied. Now, Petitioner respectfully petitions this Honorable Court for review.

b) **Statement of Facts**

Plaintiff, a Hispanic, filed a suit alleging discrimination because of his Hispanic national origin in a demotion by Bethlehem Steel. This Honorable Court, per Gibbons, J., structured the case as follows:

> "The district court held, and without deciding we assume for purposes of this decision, that Ramos made out a prima facie case. The court held further that Bethlehem had satisfied its burden of meeting that prima facie case by producing evidence of a non-discriminatory business reason for the Ramos demotion, namely, his poor performance evaluations.
>
> Ramos challenges the latter holding by suggesting that these evaluations

were themselves racially motivated. There is no record evidence suggesting this. While those making the evaluations may have been mistaken in their appraisal of his skills, there is nothing in the record from which a reasonable inference could be drawn that national origin had anything to do with those appraisals. See, Hawkins v. Temple Univ., 829 F.2d 437 (3d Cir, 1987). Ramos points to evidence that Martin, a supervisor, once referred to another Hispanic as a "spic". The record discloses, however, that Martin did not make the demotion decision, that his appraisal of Ramos was consistent with that made by a black and a Hispanic supervisor, and that Bethlehem reprimanded Martin for the remark. This isolated incident cannot support an inference that the Bethlehem decision makers acted for reasons of national origin."

The simple fact is, however, that the United States Court of Appeals ignored the evidence in the record because it did not want to address the real issue in this case, namely can an employer who delegates to a flagrant racist, the decision to demote other employees thereafter prevail on summary judgment on grounds of "business justification" when the flagrant racist

actually demotes African Americans and Hispanics? In order to avoid reaching this decision, the United States Court of Appeals, Third Circuit, made five factual findings which are unsupported by the record:

1) Martin did not make the decision to demote Ramos;

2) Martin's evaluation was the same as the evaluation made by Ben Pinckney, Ramos' African American supervisor;

3) Martin only referred to one employee as a "Spic";

4) Ramos had poor evaluations;

5) Martin was disciplined for his one racial slur.

These five rationales used by the United States Court of Appeals are exactly the opposite of the testimony found in the record.

FALLACY NO. 1: Martin did not really make the decision.

Charles Luthar, the superintendent of the Coke Division, indicated that "...the decisions for the demotions came from the department. It has to." (354a) Luthar further indicated that "...Martin became one of the deciders as to who was going to stay and who was going to go...." (393a) Luthar further indicated that Martin played a "...very important role..." (393a)

> "Q. What was the basis for Martin playing the very important role?
> A. He was coming into the coke oven maintenance department and he was responsible for the operation of that department, and his input was very important in order to try to best operate that department efficiently after whatever changes were going to come about were going to be made. He had to have input into his new organization."
>
> (393a)

Luthar made clear that Martin's opinion on who he wanted to demote was given as much weight as performance evaluations:

> "Q. If you are basing it on performance evaluations, why did you consult

with Bill Martin?
A. Why? Because he was taking over the organization and he had knowledge of the organization .
Q. What was the standard then, the performance evaluation or Martin's opinion as to who he wanted?
A. Both. Bill's opinion was very important because he was taking over management of this section on July 1st. It was important for him to have an input."

(479a)

Hence, the record contradicts the claim by the United States Court of Appeals that "...Martin did not make the demotion decision."

FALLACY NO. 2: An African-American, Ben Pinckney, gave Ramos the same evaluation as the racist, Bill Martin. The African-American supervisor, Ben Pinckney, testified on behalf of Petitioner, and he gave Petitioner a very good evaluation:

"Q. Did he ask to talk about Ramos or did he ask you for anybody else, just Ramos?
A. Pete Ramos.
Q. And what did you tell him about Ramos?
A. I told him that the last evaluation given to Pete was good and the fact that the good was acceptable

because Peter had been previously trained to be a weld shop supervisor and that he was just placed into the mechanical side, and he was doing a good job on the mechanical side because of the new mechanical responsibilities.
Q. What else did you say to Luthar?
A. That's about it, really, in a nutshell.
Q. What did Luthar say in response to that?
A. Thank you.
Q. The good evaluation, that was signed by Ken Sutton, was it not?
a. Yes.
Q. The evaluation the year before was signed by you?
A. Correct.
Q. That was a very good?
A. Yes."

(46a)

Despite the fact that Pinckney was Ramos' immediate supervisor, he was never consulted about evaluating Ramos for purposes of demotion, and on the contrary, he was told about it after the fact of the demotion:

"Q. Do you know who got demoted and who stayed?
A. After the fact I did.
Q. After the fact. So you weren't consulted beforehand but they told you after the fact?
A. I saw it after the fact. I knew it after the fact.

Hence, the record is clear: Ramos' black supervisor, Ben Pinckney, was not involved in decision to demote Ramos, Pinckney's own evaluation of Ramos was "very good", and the "new" supervisor, Bill Martin, alone, was making the decision concerning Pedro Ramos. Hence, the record again contradicts the claim by the United States Court of Appeals that Martin's "...appraisal of Ramos was consistent with that made by a black..."

FALLACY NO. 3: Martin only referred to one employee as a Spic.

The record discloses that Martin was an overt racist who called African Americans "niggers" and Hispanics "spics".

> "Q. You have called Hispanics Spics?
> A. I have referred to Nelson Matos and he calls me a Wasp, that four letter word that I won't say. We kid back and forth. Whether they call that shoptalk--
> Q. You do have a habit of referring to Hispanic people as Spics?
> A. It is not a habit.
> Q. You have done it since July 1st, '85, and you did it before July 1st,

'85, isn't that a fact?
A. Certainly, yes.
Q. Do you recall calling Pedro Ramos, Pete?
A. No, not Pete but maybe in kidding.
* * *
Q. That's when you used to call him a Spic?
A. I don't recollect ever saying that to Pete. If I did it was in kidding and I'm sure--well, I would think that Mr. Ramos would take it that way. Mr. Matos takes it like a grain of salt as it's offered. He calls me other things. We do that kind of thing.
Q. Why do you consider that an appropriate form of kidding around to make fun of a person's ethnic heritage?
A. That has been done for years and years and years and it will never stop.
* * *
Q. So you consider that an acceptable form of shoptalk, to call people Spics, if they are Hispanics, is that your testimony?
A. It if--if it was ever done in malice, no, absolutely not. When you are kidding around with an individual it's no problem.
Q. What kidding around names do you use for black people, nigger?
A. Yes. You know, what is a good slang term for a Wasp?
Q. You tell me what is a good slang term for black people?
A. What you have just said, certainly.
* * *
Q. What do you use?
A. I don't know. I don't think of anything now. Mostly it would be if you are going to say something de-

rogatory about a certain race, you would use the common term which would be what you said, which would be a nigger.
Q. You have used that one, too?
A. In jest, yes."

Hence, the record again contradicts the claim by the United States Court of Appeals that "...Martin, a supervisor, once referred to another Hispanic as a 'spic'"...or its characterization of this as an "isolated incident".

FALLACY NO. 4: Ramos had poor performance evaluations. The simple truth is that Pedro Ramos never had a poor performance evaluation. His "performance evaluations" were usually "Very Good", and his worst evaluation ever was "Good" after he was given a difficult assignment and was involved in a transitional period. This version of the facts is not just Ramos' claim, but it was even established as a fact by the trial judge who reviewed the record:

> "It is clear from the record of the arbitration hearing that plaintiff was, indeed, qualified for the position of foreman. There is absolutely no indication that his job performance ever fell below that which was expected of foremen, having been consistently rated very good or good by his superiors in periodic evaluations. Moreover, plaintiff was offered the opportunity to resume foreman duties on a temporary basis on several occasions subsequent to his demotion. For these reasons, we conclude that plaintiff has established a prima facie case of discrimination on the basis of national origin under Title VII."
>
> Opinion, Honorable E. Mac Troutman, p. 3.

Hence, the record again contradicts the claim by the United States Court of Appeals that Ramos had "...poor performance evaluations."

FALLACY NO. 5: Martin was disciplined for his one racial slur.

No disciplinary action was ever taken against Martin for calling blacks "niggers" and Hispanics "spics", (488a, 491a,492a,496a). After it came out at the arbitration hearing that Martin did, in

fact, engage in such conduct, a memorandum was written indicating that no supervisor should use racial epiteths in the future. As was conceded by Bethlehem Steel, however, no notation was made anywhere in Martin's personnel file that he was guilty of such behavior so his personnel file would be clean. (496a)

This procedure was not surprising given the fact that John Micheson, the superintendent of the "Coke" plant and Charles Luthar's supervisor did not think usage of words like "nigger" and "spic" were racist terms:

> "Q. In other words, you don't view it as racist?
> A. Not particularly."

Hence, the record again contradicts the claim by the United States Court of Appeals that "...Bethlehem reprimanded Martin for the remarks."

ARGUMENT

I. WHETHER OR NOT AN EMPLOYER CAN PREVAIL ON A RACE/NATIONAL ORIGIN DISCRIMINATION CLAIM UNDER TITLE VII ON SUMMARY JUDGMENT ALLEGING BUSINESS JUSTIFICATION WHERE THE EVIDENCE INDICATES THAT A FLAGRANT RACIST MADE THE DECISIONS TO DEMOTE THE AGGRIEVED EMPLOYEE, AND THAT THE FLAGRANT RACIST OFTEN ON THE JOB CALLED AFRICAN AMERICANS "NIGGERS" AND HISPANICS "SPICS"?

In its Memorandum Opinion, the United States Court of Appeals, Third Circuit, noted as follows:

> "The record discloses, however, that Martin did not make the demotion decision, that his appraisal of Ramos was consistent with that made by a black and an Hispanic supervisor, and that Bethlehem reprimanded Martin for the remark."

IF the obligation of this Court is to read the record in a light most favorable to defendants requesting summary judgment, then this statement may be arguably correct. On the other hand, IF the requirement is to read the record in a light most favorable to the non-moving party, then each and every one of the "facts" asserted

in the statement is absolutely wrong.

The decision was being made by Mitcheson-Luthar who claimed that they were getting input from Plaintiff's black supervisor, Ben Pinckney, and from the new boss, Bill Martin. As Luthar pointed out, the decision was being made at the departmental level (Pinckney/Martin). Pinckney, the African-American supervisor, testified on behalf of Petitioner that he was not consulted about the demotion decision, and that he learned about it after the fact. His own written evaluation of Petitioner, however, was "very good". As admitted by Luthar, Martin's role in the demotion was "very important". Since the African-American supervisor was not consulted about the decision, and since Bill Martin was, the only logical conclusion is that the actual decision to demote Ramos came from Bill Martin.

The evidence also indicates that Bill

Martin was a flagrant racist. He did not say that he "once" called a Hispanic a "spic". On the contrary, he indicated that he always "kidded" around with African-Americans and Hispanics by calling them "niggers" and "spics".

His testimony in front of the arbitration panel was so damaging that Bethlehem Steel felt a need to do something to salvage the record. Contrary to the claim by the United States Court of Appeals that Bethlehem Steel "reprimanded" Martin for his racist remarks, Bethlehem Steel wrote a self-serving memorandum telling all supervisors <u>not</u> to use such language in the future. Nothing, however, was put in writing confirming that Bethlehem Steel was in any way disciplining Martin, and on the contrary, his personnel file contains not a single notation about the incident. Martin was given a free hand to continue discriminating against African Americans and His-

panics, and the next civil rights claimant will find nothing in his record to show that Martin engaged in this deplorable behavior before.

The United States Court of Appeals also refers to a "non-discriminatory business reason for the Ramos demotion, namely, his prior performance evaluation." The simple truth, however, is that every written evaluation by every one of Ramos' supervisors was "very good" with the exception of one by Ken Sutton which rated Ramos "good". The only mention in the record of "poor performance evaluations" is by racist, William Martin, and he could not produce a written evaluation by anyone to support. That was William Martin's racist interpretation of Pedro Ramos' "very good" and "good" evaluations.

This Court also refers to the fact that Martin's appraisal was consistent with that made by an African-American, (Ben

Pinckney--refuted by his testimony) and a Hispanic supervisor. As already indicated, the African-American supervisor rated Ramos "very good". Ramos had no Hispanic supervisor. Where the Court found this "fact" in the record is unknown.

In the record, Bill Martin admitted that he used only subjective criteria, not evaluations or recommendations when deciding which employees to eliminate or demote. When asked about his decision as to which of Defendant's employees to eliminate, Mr. Martin responded:

> "...If it was as it was told, it was going to be my operation, and these were the numbers I was supposed to run with, you know, who falls out, which party or body do you cut off. That's what I did.
> Q. Tell me how you did it.
> A. I just did.
> Q. Was that the whole analysis?
> A. Yes.
> Q. Did you look at the evaluations?
> A. No, sir.
> Q. You never looked at any evaluations?
> A. No.
> Q. They were not a relevant criterion?

A. None at all.
Q. So basically it boiled down to your subjective feeling about individuals, is that correct?
A. Yes. If I was going to be the boss of that organization, I'm going to surround myself with people that I think in my opinion are the proper teammates.
Q. Is that--was that actually done, whatever you want was done?
A. Yes. It's obvious that's what happened."

App. p. 108a

Mr. Martin admitted that he was not concerned with qualifications. His decision was <u>wholly</u> subjective as follows:

"Q. You were told you had to wind up with eight people in this capacity as foremen and that was that?
A. There is eight now so that was it, yes, sir. Two guys are going to fall out. Whether they be purple with pink polka dots, two guys are going to fall out.
Q. Even if they had better qualifications or more able, that wasn't a concern that you were going to follow, you only wanted a group to work with that you felt you were going to be comfortable with?
A. Yes, because it is my ultimate responsibility to keep the coke plant operating."

App. p. 116a

So, regardless of qualifications, Mr.

Martin proceeded to eliminate the one person he felt least comfortable with, that is Pedro Ramos, the only Hispanic or minority in the group.

Mr. Martin's derogatory racial remarks are evidence that race/national origin played a part in the demotion and failure to recall Petitioner. In Price Waterhouse v. Hopkins, 490 U.S. ___ 104 LE.2d 109 S.Ct. ____ (1989), persons involved in the employment decisions made stereotypical remarks about females. Even though the persons making the remarks sided with Plaintiff in the employment decision, the Supreme Court found that the adverse remarks "can certainly be evidence that national origin played a part in the decision". Id. at 104 L.Ed.2d at 288.

Respondent admitted taking no disciplinary action against Mr. Martin or any other Respondent employee who admitted using ethnic slurs such as "spic" and

"nigger". App. p. 152a. Obviously, Mr. Martin had his mind made up to eliminate Ramos regardless of Ramos' experience and qualifications. Mr. Martin made no inquiry into Ramos' experience and qualifications. Mr. Martin admitted that he made a wholly subjective decision. Defendant implemented Mr. Martin's decision without reservation despite the fact that Mr. Martin has called other employees "spics" and "niggers".

In sum, even though Respondent may claim that Petitioner was the least effective employee, the record demonstrates otherwise. Further, the man who primarily, if not unilaterally, made the decision to demote Pedro Ramos was a flagrant racist who admits using his own subjective criteria without regard for Ramos' experience and qualifications.

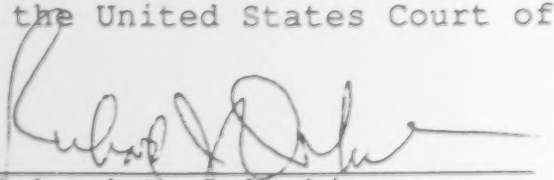
In the case at bar, Pedro Ramos demonstrated that the decision to demote him was left to the unrestricted, subjec-

tive judgment of white supervisor who admitted calling employees "spics" and "niggers". This evidence standing alone is sufficient to preclude summary judgment in favor of an employer who delegates the responsibility of demotions to a person who is proven to be a racist.

Pedro Ramos met his burden of production that an illegitimate factor entered into Respondent's decision to demote as set forth hereinbefore. At very least, genuine issues of material fact concerning the illegitimate factor preclude summary judgment. Price Waterhouse v. Hopkins, supra. Petitioner thus seeks review by this Honorable Court.

CONCLUSION

Petitioner respectfully seeks a Writ of Certiorari to the United States Court of Appeals.



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1498

PEDRO RAMOS,
Appellant

v.

BETHLEHEM STEEL CORPORATION,
Appellee

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judges, and (GERRY, District Judge as to panel rehearing only.)

The petition for rehearing filed by the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

John Gibbons
C.J.

DATED: November 28, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1498

PEDRO RAMOS,
Appellant

vs.

BETHLEHEM STEEL CORPORATION,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNA.

(D.C. Civil No. 86-2095)
District Judge: Hon. E. Mac Troutman

Submitted under Third Circuit Rule 12(6)
October 30, 1989
Before: GIBBONS, Chief Judge, and MANSMANN, Circuit Judge, and GERRY, District Judge
Hon. John F. Gerry, Chief Judge, United States Court for the District of New Jersey, sitting by designation.

(Opinion Filed: OCT. 30, 1989)

MEMORANDUM OPINION OF THE COURT

GIBBONS, Chief Judge:

Pedro Ramos appeals from a summary judgment in favor of his employer Bethlehem Steel Corporation in his suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000 to 2000e-17 (1989), in which he charges that he was discriminated against on the basis of his Hispanic national origin when he was demoted from a position as salaried foreman to a position as an hourly bargaining unit employee.

Our review is plenary. We have examined the summary judgment record, which consists of the pleadings and of testimony in a court-annexed non-binding arbitration hearing. We are convinced that summary judgment was proper, and thus we will affirm.

The record establishes that because of reduction in force dictated by economics, Bethlehem decided it was necessary to eliminate seven of sixteen salaried positions in its Coke Ovens Division. For

were eliminated by early retirement. The other three were eliminated as a result of performance 4valuations, of which Ramos received the lowest overall.

The district court held, and without deciding we assume for purposes of this decision that Ramos made out a prima facie case. The court held further that Bethlehem had satisfied its burden of meeting that prima facie case by producing evidence of a non-discriminatory business reason for the Ramos demotion, namely, his poor performance evaluations.

Ramos challenges the latter holding by suggesting that these evaluations were themselves racially motivated. There is no record evidence suggesting this. While those making the evaluations may have been mistaken in their appraisal of his skills, there is nothing in the record from which a reasonable inference could be drawn that national origin had anything to do with

those appraisals. See Hankins v. Temple Univ., 829 F.2d 437 (3d Cir, 1987). Ramos points to evidence that Martin, a supervisor, once referred to another Hispanic as a "spic". The record discloses, however, that Martin did not make the demotion decision, that his appraisal of Ramos was consistent with that made by a black and a Hispanic supervisor, and that Bethlehem reprimanded Martin for the remark. This isolated incident cannot support an inference that the Bethlehem decision makers acted for reasons of national origin.

Ramos contends the summary judgment record makes out a case of disparate impact because his evaluations were in part subjective. See Watson v. Fort Worth Bank & Trust, 108 S.Ct. 2777 (1988). The record does not disclose, however, that the methods of evaluation used in the Coke Ovens Division had a significant adverse

impact on Hispanic employees. Thus he has neither pleaded nor offered evidence establishing a prima facie case of disparate impact. He cannot at this stage in the case seek the opportunity to proceed on a legal theory which was not presented in the district court.

Ramos also contends that this was a mixed motive case within the meaning of Price Waterhouse v. Hopkins, 109 s.Ct. 1775 (1989). There is no record evidence supporting a mixed motive theory. Bethlehem came forward with a business justification unrelated to national origin, and Ramos produced no evidence from which an inference could be drawn that national origin played any role in the demotion decision.

The judgment appealed from will therefore be affirmed.

TO THE CLERK OF THE COURT:

Please file the foregoing Memorandum Opinion.

John Gibbons
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PEDRO RAMOS	:	CIVIL ACTION
Plaintiff	:	
	:	NO. 86-2095
vs.	:	
	:	
BETHLEHEM STEEL CORP	:	
Defendant	:	

TROUTMAN, S.J.

O R D E R

AND NOW, this 17th day of May, 1989, upon consideration of defendant's motion for summary judgment, (Doc. #15), and plaintiff's response thereto, IT IS ORDERED that the motion is **GRANTED** and judgment is entered in favor of the defendant and against the plaintiff.

/S/E. MAC TROUTMAN
S.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PEDRO RAMOS Plaintiff	:	CIVIL ACTION
	:	NO. 86-2095
vs.	:	
BETHLEHEM STEEL CORP Defendant	:	

TROUTMAN, S.J.

M E M O R A N D U M

Plaintiff Pedro Ramos instituted the present action against Bethlehem Steel Corporation as a result of his having been removed from a salaried position as a permanent foreman in the maintenance section of the Coke Ovens Department at defendant's Bethlehem plant and returned to the ranks of hourly employees. Plaintiff alleges that his demotion resulted from defendant's intentional discrimination against him because of his Hispanic national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), et seq. and contends that the

demotion resulted in loss of status, pay and fringe benefits.

Because plaintiff's alleged losses did not exceed $75,000, this case was assigned to arbitration pursuant to Eastern District of Pennsylvania Loc.R.Civ.P. 8. The arbitration hearing in this case was held on three days, march 19, April 13 and July 21, 1987. On August 3, 1987, the arbitrators found in favor of the defendant and plaintiff subsequently requested a trial de novo. Defendant has moved for summary judgment, contending that plaintiff failed to make out a prima facie case of discrimination under Title VII. In the alternative, defendant argues that it has articulated a legitimate, no-discriminatory reason for the plaintiff's demotion, while plaintiff cannot bear his ultimate burden of proof in that he has failed to adduce any evidence suggesting that such reason was a mere pretext for discrimination.

Defendant agrees that plaintiff is properly before the court, having fulfilled all conditions for maintaining a Title VII suit in the district court. Likewise, defendant does not dispute plaintiff's ability to establish two of the elements of a prima facie case of national origin discrimination, i.e., that he belongs to a protected class and that others, not in the protected class, were treated more favorably. Hankins v. Temple University, 829 F.2d 437 (3d Cir. 1987). Defendant contends, however, that plaintiff cannot establish the remaining element, i.e., that he was qualified for the position. Id.. For this argument, defendant relies upon Spangle v. Valley Forge Sewer Authority, 839 F.2d 171 (3d Cir, 1988), where the district court's entry of summary judgment in favor of the defendant was affirmed by Court of Appeals upon the court's conclusion that Plaintiff had failed to

show that he was qualified for the position to which he had not been promoted.

In Spangle, the performance evaluations produced by the plaintiff to support his qualifications for the position he sought demonstrated instead his weakness in the very skills most needed for the position, leaving plaintiff with only his own conclusory declaration that he was qualified for the position to support that element of his prima facie case.

Defendant does not contend that plaintiff here, as n Spangle, has failed to produce evidence that he satisfactorily performed his supervisory duties prior to his demotion. Instead, defendant contends that plaintiff cannot demonstrate that he was as qualified as others who were not demoted. Defendant provides no legal support for this subtle alteration of the standard to be applied to this element of the prima facie case and the Court declines

to adopt it. The issue of whether plaintiff was more, equally or less qualified to fill a foreman's position in relation to other employees is more properly reserved for consideration in connection with other issues, i.e., whether defendant has articulated a genuine, nondiscriminatory reason for demoting the plaintiff and whether plaintiff has raised an inference that defendant's proferred reason is pretextual.

It is clear from the record of the arbitration hearing that plaintiff was, indeed, qualified for the position of foreman. There is absolutely no indication that his job performance ever fell below that which was expected of foremen, having been consistently rated very good or good by his superiors in periodic evaluations. Moreover, plaintiff was offered the opportunity to resume foreman duties on a temporary basis on several occasions subsequent to his demotion. For these

reasons, we conclude that plaintiff has established a prima facie case of discrimination on the basis of national origin under Title VII.

Although a conclusion 6that plaintiff has established a Title VII prima facie raises a presumption of discrimination, plaintiff's ultimate burden, in order to defeat the summary judgment motion, is to demonstrate that there is sufficient evidence in the record from which a rational trier of fact could find that the defendant intentionally discriminated against the plaintiff. Hankins v. Temple University. Thus, in accordance with the shifting burdens of production analysis employed in Title VII cases,[1] our attention turns to

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1.The court's analysis of this case follows the model of the so called "disparate treatment" case under Title VII, since we conclude that the evidence of record warrants only this type of analysis.
After the initial briefing of the summary judgment motion was completed, plaintiff

the defendant's proferred reason for the

...Continued...

submitted a supplemental memorandum based upon the case of Watson v. Forth Worth Bank and Trust, 487 U.S. ___, 108 S.Ct. ____, 101 L.Ed.2d 827 (1988), purporting to demonstrate that a disparate impact analysis may be applied to his claim.

Assuming, without deciding, that this case would be appropriate for disparate impact analysis under Watson, plaintiff still has the burden of proving, initially, that the employer's actions had a disparate impact upon Hispanic employees and that any identified statistical disparities were sufficiently substantial to raise an inference of discrimination. Plaintiff has not produced any evidence relating these issues, suggested that such evidence is available or requested the opportunity to compile such evidence and supplement the record therewith.

Moreover, once a prima facie case has been established, defendant's burden of articulating a legitimate business reason for its action does not differ, whether the case s analyzed under disparate impact or disparate treatment theories. Thus, even if plaintiff had produced evidence of disparate impact, it would be relevant only if the Court concludes that defendant met that burden. A disparate impact analysis could not be used to counter defendant's evidence on that issue, as plaintiff seems to suggest in his supplementary memorandum. Consequently, upon consideration of Watson and in light of the record, we conclude that this case is not appropriate for a disparate impact analysis.

action taken with respect to the plaintiff. If we conclude that defendant has succeeded in articulating a legitimate, nondiscriminatory reason for demoting the plaintiff, we then consider whether plaintiff has succeeded in demonstrating that, contrary to defendant's assertions, its proferred reason was merely a pretext for removing plaintiff from the position of foreman. Id. If, having considered all the facts and having drawn all inferences from them in plaintiff's favor, the Court concludes that plaintiff has not adduced sufficient evidence to demonstrate that there are any material facts in dispute with respect to these issues, the Court must then conclude that plaintiff cannot prove intentional discrimination at trial and will be required to grant defendant's motion for summary judgment.

Accordingly, we now turn to a more complete consideration of the facts of the

case, as gleaned from the record of the arbitration hearing, in order to determine whether there are any material issues of fact in dispute and whether, from the undisputed facts, defendant has succeeded in demonstrating that plaintiff cannot prove intentional discrimination.

The plaintiff's demotion resulted from a reorganization and reduction in salaried personnel in the Coke Oven Department of Bethlehem Steel's Bethlehem plant, effective July 1, 1985. As we understand plaintiff's position, he does not dispute defendant's contention that reductions in salaried personnel were necessitated by adverse business conditions. Rather, with respect to defendant's overall business needs, plaintiff argues that the reduction and reorganization was a pretext for removing plaintiff from his salaried position. Plaintiff further contends that the specific decision to eliminate Ramos rather than

others in the same position who might have been demoted was subjective and intentionally discriminatory, directed primarily toward the end of eliminating Hispanic employees [1] from salaried positions and not for any legitimate business reason.

Plaintiff suggests that there is a conflict in the record as to how the final decisions regarding demotions and transfers were reached and who was primarily responsible for those decisions. Plaintiff has identified no evidence, however, to contradict the testimony of John Mischisen,

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[2] It appears, at times, that plaintiff seeks to broaden his claim of discrimination in connection with the Bethlehem Steel Coke Ovens reorganization to include all "minorities" who were affected by the changes implemented on July 1, 1985. If this is plaintiff's intention, it adds nothing to his claim. His is an individual suit for disparate treatment. Suggestions that Bethlehem Steel engaged in broad discriminatory practices which affected "minority" employees in general is not a claim made in the complaint and is, in any event, not supported by the record.

then Superintendent of the entire department, that management's initial strategy for reducing by seven the salaried positions n the department was to seek retirements from among the sixteen salaried employees who were then eligible for pensions. (Record of Arbitration Hearing, Vol.III, Doc. #20 at 52). Four of those employees elected to retire after meeting individually with Mischisen, leaving three positions still to be eliminated. (Id. at 55).

Likewise, there is no evidence to dispute defendant's accounts of the next several steps in the process, although the sequence thereof is somewhat unclear in the record. As noted, the entire department was undergoing reorganization simultaneously with the reduction in force. As part of that process, the maintenance section, where plaintiff works, was consolidated, for management purposes, with

the Coke Oven Department. (Id. at 47). The plaintiff's ultimate supervisor, Ben Pinckney, agreed to move to another department when he was asked to do so. (Vol. I, Doc. #18 at 44). A supervisor then in anther department, William Martin, was asked to take Pinckney's maintenance position and likewise agreed to do so. (Vol. II, Doc. #19 at 71). Although it is clear that these plans were finalized in May or early June, 1985, the changes did not become effective until July 1, at the same time as the reduction in force. In the meantime, Mischisen and his assistant, Charles Luthar, also had to determine how to eliminate three foremen positions from the entire Coke Oven department, now including maintenance.

Pinckney, maintenance supervisor prior to July 1, 1985, testified that he was asked specifically about Ramos' performance by Luthar but was not asked for recommenda-

tions as to which, if any, of the foremen he supervised should be eliminated. (Doc. #18 at 17). Luthar, on the other hand, testified that he asked Pinckney simply to rank the maintenance foremen. (Id. at 165). Luthar also testified that he examined the most recent performance evaluations of the foremen and noted that in the most recent evaluation, plaintiff was rated lower than the other foremen in his section. (Id. pp. 168-173). Despite the discrepancy in the testimony as to what Pinckney was asked to do, he agreed that plaintiff was not as good as the other mechanical maintenance foremen and that he so informed Luthar. (Id. at 40-41).

During this period, May and June 1985, Mischisen and Luthar also held a meeting in which Martin, the incoming maintenance supervisor, participated, along with certain foremen from the "operations"

sections of the Coke Oven Department.[1] Martin testified that he was asked to rate the foremen in maintenance in the order of decreasing effectiveness and he determined that the plaintiff, Ramos, and Ken Sutton, the general foreman, were the least effective performers in that section. (Doc. #19 at 75, 88-90). Richard Guerra, another meeting participant, testified that he found Ralph Threet, a foreman recently transferred from another plant, to be least effective among the employees Guerra supervised. (Doc. #20 at 19). Luthar testified that he also consulted Joe Flaska, general foreman of the Coal Chemicals section, who

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3 Testimony adduced at the arbitration hearing supports a division of the Coke Oven department into "operations" sections, in which the employees actually work with equipment to make the product and a "maintenance" section, in which the employees keep the equipment in good working order. The record also establishes that the ability to work in maintenance necessarily includes the ability to operate the equipment which a maintenance foreman is responsible for keeping in good working order.

determined that Eddie Rivera was his least effective foreman. (Doc. #19 at 204).

When the reduction/reorganization was implemented, Martin became the maintenance supervisor, Pinckney was transferred, Sutton was demoted from general foreman of the maintenance section and transferred to Oven Section as a foreman and Ramos was returned to the collective bargaining unit as an hourly employee. Coke Oven Department employees affected who were not in the maintenance section were Threet, who was sent back to another plant, from which he had earlier been transferred, and Rivera, who was also returned to the ranks of hourly employees. Pinckney and Threet are black, Ramos and Rivera, Hispanic and Martin and Sutton, white. Thus, two Hispanic and one white employee were demoted, but the Hispanic employees were returned to the bargaining unit, while the white employee remained a salaried foreman in

another section.

While, as noted, there are some discrepancies in the record as to exactly who said what to whom and when, the resulting changes, both in the maintenance section and in the Coke Oven Department generally, are consistent with the testimony of Mischisen and Luthar, who said that they considered employee performance evaluations n making their decision as to which employees would be affected by the reduction in force, but relied heavily upon the advice of the employees who worked directly with the individuals affected. It is also consistent with the testimony of Martin, who believed that it was his prerogative to select the "team" with which he wanted to work as maintenance supervisor in order to maximize the performance of the maintenance section. Consequently, we conclude that the inconsistencies in testimony observed in this record raise no

material issues of fact with respect to how and why the initial demotion decisions were reached.

In January, 1986, approximately six months after the initial reduction and reorganization in the Coke Ovens Department, additional reductions in force were necessary in other departments of the Bethlehem plant. Moreover, there were additional retirements in the maintenance section. Consequently, some employees who had been "operations" foremen were transferred to maintenance as foremen. Plaintiff was not recalled from the bargaining unit to fill any of the new vacancies. All of the transferred employees were white, and it appears that they did not possess at least one skill, i.e., the ability to read blueprints, necessary to perform successfully as a maintenance supervisor.

The issues which the Court must consider in light of the foregoing facts and the arguments the plaintiff makes from them are whether the decisions to demote Ramos and, later, to fill vacancies with white employees transferred from other departments, rather than to recall Ramos, represented legitimate business decisions or whether these decisions served as a pretext for discrimination against Ramos because he is Hispanic. Plaintiff seems to attack on both grounds his demotion and the failure to promote him again when salaried positions in maintenance again became available.

With respect to the initial decision to demote him, plaintiff adduced evidence that he was well regarded as a foreman and that he possessed adequate mechanical knowledge and skills as well as an ability to motivate and discipline his subordinates. Moreover, several employees whom he

had supervised testified that he was the best welder among the maintenance foremen. There is no real dispute as to plaintiff's ability to fulfill the requirements of a maintenance foreman position. Indeed, all of defendant's representatives who were involved in the reduction in force decisions testified that it was very difficult to determine how to eliminate the employees who had to be removed from salaried positions in the department. On the other hand, all of the supervisory personnel who testified, including Louis Szoke, who played no part in the demotion decision, indicated that plaintiff was weakest in electrical and mechanical skills. All rankings of maintenance foremen included in the testimony placed heavy emphasis on the need for such skills in a maintenance foreman. By contrast, although it was generally agred that plaintiff's welding skills were outstanding, there is nothing

in the record to indicate that such skill was of great value in performing successfully as a maintenance foreman. Similarly, plaintiff's ability to deal positively with the employees he supervised is unquestioned, but plaintiff has pointed to no evidence of record which would indicate that other foremen, who were not demoted or who were transferred to other sections as foremen instead of being demoted, were less skillful in this aspect of the job. In general, plantiff has identified no evidence from which the Court could infer either that plaintiff's skills were more important than skills possessed by other foremen or that his skills in the areas of greatest importance to the position were equal to or better than those of other maintenance foremen who were not demoted.

Thus, there is no evidence in the record from which the Court can conclude

that there is a genuine issue of material fact as to whether Plaintiff's demotion resulted from a legitimate business decision. The record indicates that plaintiff was weakest in a skill identified as very important for a maintenance foreman. Plaintiff has not contradicted this evidence, producing instead, evidence that plaintiff had been a successful and well-liked foreman, niether of which is either disputed or dispositive of the issue of whether plaintiff's demotion resulted from a legitimate business decision. Consequently, we conclude that defendant has articulated a legitimate business reason for demoting plaintiff in that he was the least effective foreman in the maintenance section and identified by the new supervisor of that section as the most expendable, while plaintiff has presented no evidence to the contrary.

The Court has also considered other

facts, identified by Plaintiff as discriminatory, such as the transfer of Sutton, but not plaintiff, to another section as a foreman, as well as defendant's subsequent decision to transfer to Coke Oven maintenance foremen from other departments rather than to promote plaintiff again when those positions became available. The record supports the conclusion that these were also legitimate business decisions, with no contradictory evidence identified by the plaintiff. With respect to Sutton, Guerra testified that he requested that Sutton be transferred to his section because he possessed needed electrical skills. (Doc. #20, at 24-29). Similarly, Luthar testified that he and Mischisen felt that Sutton had management strengths that were necessary for their operation and which they wished to retain. (Doc. #19 at 244).

With respect to the transfers of foremen from other departments to the Coke Oven Department in the wake of additional retirements early in 1986, Luthar testified that the retirements allowed management to mitigate the effects of a further reduction in force which had been announced by moving foremen whose prior positions had to be eliminated. (Doc. #19, at 17-24). Plaintiff, through several witnesses, adduced evidence that these transferees had less experience, in terms of number of years at Bethlehem Steel, than Plaintiff and could not read blueprints. Nevertheless, plaintiff has identified no evidence of record to indicate that these circumstances render plaintiff equally qualified or more qualified than the transferees to be a foreman n either maintenance or operations. His unsupported contention that such is the case is not controlling. On the other hand, Martin

testified that plaintiff would not have been qualified, as a temporary foreman, to substitute for Palinkas or Beam, two of the foremen who were transferred to replace later retirees. (Doc. #19 at 129). This evidence suggests that plaintiff was not as well-qualified as they for their positions, and is uncontradicted. We conclude, therefore, that defendant had also articulated legitimate business reasons for failing to transfer plaintiff to another foreman position initially and later failing to promote him again when positions became available.

In support of his allegation that the reason given for his demotion was pretextual, plaintiff makes several arguments, which the Court will address seriatim. First, plaintiff notes that Bethlehem Steel has a history of discrimination against minorities, as evidenced by its joining in two consent decrees several years ago. If

this observation is meant to suggest that because Bethlehem Steel once signed consent decrees in which it agreed not to practice discrimination in violation of Title VII, it must still be discriminating against the classes of employees protected by the consent decrees, the Court cannot accept such an argument. To consider acceptance of a consent decree as an indication that a defendant is practicing the very kinds of discrimination that the consent decree was designed to eliminate would be, to say the least, a perverse result. Plaintiff's next argument concerns defendant's alleged failure to follow procedures specified in the "Statement of Bethlehem's Equal Employment Opportunity Policy," Section 1100-Procedure for Promotion to Supervisory and Professional Positions (Exhibit D to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, Doc. #17), which provides, in Section 1101

that:

> "A Supervisory Review Committee should be established at each facility. The Supervisory Review Committee's prime responsibility is to approve a list of employees to work as temporary supervisors, to approve promotions of hourly and non-exempt employees to firstline supervisory positions and to approve all other promotions, both supervisory and professional, up to the level of Home Office paid positions. The Supervisory Review Committee shall also be responsible for reviewing all demotions or terminations from supervisory and professional positions to ensure that illegal considerations of race, color, religion, sex, national origin, age, handicap, or veteran status are not a factor in any demotions.

The Court discerns two components to plaintiff's argument on this issue: first, that the managers who implemented plaintiff's demotion failed to use certain necessary forms to process and facilitate review of the proposed action; second, that the Supervisory Review Committee considered the actions taken with respect to the Coke Oven Department reorganization some six

weeks after they were implemented. The Court can find no support in the record for the proposition that these procedures were at variance with the requirements of Section 1100 in general and Section 1101 in particular.

The Court searched, in vain, the exhibits submitted by the plaintiff for the form which plaintiff argues was necessary and which defendant admits was not used n processing plaintiff's demotion. Moreover, our review of Section 1100 disclosed no requirement that any type of form was required in connection with a demotion. We noted references to "Job Requirement Analysis" forms, "Personnel Record" forms and a form for evaluating an employee's potential for promotion. None of these forms were attached to the Exhibit D. All of the aforementioned forms were required for promotions to supervisory positions, but there was no reference to them with respect

to demotions. Indeed, the only reference to demotions is in the single sentence included in Section 1101. Moreover, there is nothing in this statement of policy which requires prior submission of personnel actions to the Supervisory Review Committee. Consequently, its subsequent review of the plaintiff's demotion raises no inference of discrimination. Plaintiff has not cited any evidence to indicate that the review conducted by the Committee was cursory or flawed in any other way, and seems to focus solely on how and when plaintiff's demotion was presented to the Committee. The Court can find no inference of discrimination from the facts surrounding either the submission of plaintiff's demotion to the Supervisory Review Committee or its actions with respect thereto.

Plaintiff's most detailed argument regarding the pretextual nature of defendant's reason for demoting the plain-

tiff revolves around the role of William Martin, the new maintenance supervisor, in deciding that plaintiff should be one of the foremen demoted from the maintenance section. Plaintiff notes that Martin admitted to using a slang term, usually found offensive to Hispanics, to refer to another employee. While Martin was reprimanded when his superiors learned of the incident at the arbitration hearing, the other employee had professed not to be offended and Martin was not further disciplined. Plaintiff appears to contend that this incident indicates a general attitude of hostility toward Hispanics on the part of both Martin and the defendant. Plaintiff also argues that Martin was an outside supervisor who had never supervised the plaintiff, and thus, presumably, was not qualified to decide who among the maintenance foremen should be demoted.

Once again, the Court concludes that

plaintiff's contentions are not supported by the record In the first instance, Martin testified that he was familiar with plaintiff's abilities, having previously worked with him, (See, e.g., Doc. #19, at 75,78,101), and plaintiff presented no contradictory evidence. Second, as noted above, the record does not support the assertion that Martin, alone, decided to demote plaintiff. Taken as a whole, the record indicates that Martin had considerable input but that the final decision rested with Mischisen and Luthar. Moreover, there is no support for plaintiff's suggestion that Luthar, who had testified that he had reviewed plaintiff's performance evaluations as part of the decision-making process did not actually do so. Likewise unsupported is the contention that the evaluations fail to support the actions taken. The evaluations supplied as part of the record (Exh. E to Doc. #17)

reveal weaknesses in plaintiff's skills consistent with the testimony of his supervisors and Martin's evaluation elicited at the arbitration hearing. Further, the latest available Summary Evaluation of Performance and Promotability/Potential, dated May 10, 1984, indicates that plaintiff's superiors did not foresee any potential for further promotion. Pinckney, who, several years earlier when he was plaintiff's immediate supervisor, had rated him "very good", assessed plaintiff's long-range potential as "fair" in 1984. Moreover, in 1984, Pinckney specifically agreed with the "good" evaluation that plaintiff had received from Sutton, who was then his immediate supervisor. This supports defendant's contention that plaintiff's performance was weak in certain essential areas. In short, there is simply no evidence that defendant failed to consider relevant information regarding the plain-

tiff or that improper considerations entered into the decision-making process. There is, likewise, no evidence that the incident of Martin's use of a slang term, referring to another Hispanic employee, not he plaintiff, was anything but an isolated instance of poor judgment.

Plaintiff makes a number of other arguments, which will not be discussed in detail because the Court has concluded that those arguments do not raise any issues of material fact with respect to the relevant issue, i.e., whether considerations of national origin played a part in the decision either to demote the plaintiff or to fail to promote him again when maintenance foreman openings became available.

Plaintiff's approach in opposing defendant's summary judgment motion can be summarized by a phrase which appears several times in his brief, i.e., "Plaintiff

believes and therefore contends/avers". The contentions following that phrase are of absolutely no value in attempting to defeat a summary judgment motion, where plaintiff's burden is to identify evidence of record from which the Court can conclude that there are genuine issues which must be resolved at trial. Celotex Corp. v. Catrett, 477 U.S. 3106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), Childers v. Joseph, 842 F.2d 689 (3d Cir, 1988). Here, in many instances, plaintiff has identified facially neutral facts and invites the Court to conclude that such facts conceal a discriminatory motive. For example, with absolutely no support, he avers that defendant specifically and aggressively induced Hispanic foremen in the Coke Ovens Department to retire by providing them with unspecified "sweeteners". Such a conclusion would be sheer speculation, since plaintiff has identified absolutely no

evidence to support it. To the contrary, the record indicates that all employees eligible for retirement in the sections subject to reduction were offered inducements to do so. Likewise, there is not a scintilla of proof to support plaintiff's assertion that some employees were asked to delay their retirements, at all, much less for the purpose of assuring plaintiff's demotion.

In summary, plaintiff has not identified any facts from which the Court can infer that the decisions to demote the plaintiff and subsequently not to promote him again when foreman positions became available were made improperly, from discriminatory motives, and not for legitimate business reasons. There is no support for plaintiff's allegation that defendant used the reorganization of the Coke Ovens Department as a means of systematically eliminating Hispanic foremen

in general and/or plaintiff, specifically. Consequently, the Court will grant defendant's motion and enter judgment in its favor.

No. 89-1327

MAR 19 1990
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEDRO RAMOS,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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I. THE QUESTION PRESENTED

Did the court of appeals err in affirming the district court's grant of summary judgment in favor of the respondent on the ground that the evidence showed that petitioner could not raise any genuine issue of fact as to whether the reasons offered for petitioner's demotion were a pretext for national origin discrimination?

II. STATEMENT OF RESPONDENT BETHLEHEM STEEL CORPORATION AS REQUIRED BY SUPREME COURT RULE 29.1

Pursuant to Rule 29.1: All of the parties to this petition are listed in the caption. Bethlehem Steel Corporation has no parent. All of its subsidiaries are wholly owned except Hibbing Taconite Company, Ontario Iron Company, Rig VI Limited Partnership, and Bethlehem Singapore Private Limited.

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PEDRO RAMOS,

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BETHLEHEM STEEL CORPORATION,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

IV. STATEMENT OF THE CASE

This case involves a claim of national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 *et seq.* Petitioner, an Hispanic, was demoted from a position of maintenance foreman in the Coke Ovens division of the Bethlehem Plant in July, 1985, as part of a reduction in the salaried workforce. Because of the continuing financial problems of respondent Bethlehem Steel Corporation, in May, 1985, Joseph Lyford, Manager of Primary Operations at the Bethlehem Plant, directed John Mischisen, Coke Division Superintendent, to formulate reorganization plans which would reduce the salaried work force in his division. (Court of Appeals Appendix at 165a). Plaintiff

does not challenge the decision to reduce the salaried workforce and has stipulated that it was an economic necessity. (434a) Mischisen and his assistant, Charles Luthar, developed a reorganization plan which eliminated seven foreman positions in the Coke Division. (168a-169a) Four foremen elected to take a voluntary early retirement, leaving three to be selected for reduction on the basis of performance. (174a).

In making this determination, Mischisen and Luthar consulted with Benjamin Pinckney, who was then Supervisor of Maintenance; William Martin, who was to become Supervisor of Maintenance; M.J. Flaska, Supervisor of the Coal Chemicals section and Richard Guerra, Supervisor of the Ovens section. (52a-53a, 83a, 143a-144a, 174a-177a). Based on a review of the written performance evaluations of the employees (429a), and the recommendations from the supervisors, Mischisen and Luthar decided which salaried employees would be affected in each of the sections to be reduced. Pedro Ramos was demoted, having been identified as the least effective performer among the foremen in the maintenance section. (177a-178a) He returned to his position as craft welder in the Coke Ovens division, where he continues to be employed.

At the time of the reduction in force, Ramos' immediate supervisor was Kenneth Sutton, who in turn reported to Benjamin Pinckney. Mr. Pinckney, who is an African-American, testified that in the period from 1978 until 1983 Pedro Ramos reported directly to him. (39a) During that period he rated Ramos' performance variously as "good" and "very good". (40a). When Luthar asked him in 1985 to evaluate the performance of Pedro Ramos, Pinckney said it was "good," but that petitioner's mechanical ability was not as good as that of the other mechanical maintenance foreman. (45a-46a, 52a-53a).

Sutton, who was plaintiff's direct supervisor prior to the force reduction, testified that in May, 1984 he did the

last formal performance appraisal of plaintiff's work as a foreman, rating him as "good." (203a, 321a). All of the seven other maintenance foremen then working received higher overall ratings of "very good." (72a-74a, 200a-207a, 322a-324a).

William Martin, who had been selected to replace Pinckney as Maintenance Supervisor when Pinckney transferred to Central Maintenance, testified that he participated, with Luthar, Flaska and Guerra, in the process of ranking foremen in the Coke Ovens according to performance. Martin based his rankings on his personal knowledge of the ability of each employee. (120a-122a). He did not make the final decision about who would be removed as a foreman by the reduction in force, but he advised Mischisen and Luthar that he would rank Sutton and Ramos lowest in the maintainance section. (123a).

Martin testified that he had jokingly exchanged ethnic slang with other employees (but not with petitioner), but had never used such language in a malicious or derogatory way. (131a) Bethlehem's policy prohibits the use of such language and, when Luthar learned about Martin's testimony, he reprimanded Martin and sent a memorandum to all section supervisors reminding them that the use of such language is not permissible at Bethlehem Steel Corporation. (149a-150a, 208a, 484a-496a).

Both Mischisen, the Superintendent, and Luthar, his assistant, testified that they together, with input from those who reported to them, made the final decisions about the reduction-in-force which occurred in July, 1985. (83a, 84a, 178a) The demotion decisions were made by Mischisen and Luthar after reviewing performance appraisals and consulting with the other supervisors in the department, including Pinckney, who is African-American, Guerra, who is Hispanic, and Flaska. Because Martin was to become Maintenance Supervisor, they also asked his opinion about the rankings of the

foremen. In petitioner's unit, Ramos and Sutton, a Caucasian, were demoted. (319a, 373a)

V. SUMMARY OF ARGUMENT

There is no basis under Rule 10 of the Rules of the Supreme Court for this Court to exercise its discretion to review this case on writ of certiorari, where the decision of the court of appeals is not in conflict with any other court, and does not involve an important question of federal law which should be settled by this Court. This case involved merely an analysis of the evidence of record, both in discovery and at trial before federal arbitrators, as to whether there was sufficient evidence offered by petitioner to defeat a motion for summary judgment.

There is also no basis in the record to justify a review of the merits of the case. Respondent articulated job-related, non-discriminatory reasons for its demotion of petitioner. There is no dispute in the record as to any of the material facts, which facts did not raise any inference that the reasons articulated were a pretext for national origin discrimination.

VI. ARGUMENT

A. The Issues Raised by This Case Do Not Warrant Review by The Supreme Court

The question presented by this petition is not of sufficient importance to warrant review by this Court. Petitioner has not asserted that this case falls within any of the considerations set forth in Rule 10 of the Rules of the Supreme Court. Indeed, there is no basis for such an assertion were it to be made. The decisions below in this case present no conflict with the decisions of other federal or state courts, and are in all respects consistent with all other circuits and this Court in their analysis and conclusions. In essence, the decisions of the lower courts in this case turn upon the facts of the case alone and

review of the case by this Court will have little or no effect upon other litigants. As then Justice Rehnquist noted in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974),

> "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

There is no basis which should cause this Court to exercise its discretion to review the case. The only argument made by petitioner is that he is dissatisfied with the determinations by the lower courts that there are no disputed material facts in this case and that respondent is entitled to judgment in its favor as a matter of law.[1]

Federal Rule of Civil Procedure 56 requires summary judgment if there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. It is true that the burden of proving entitlement to summary judgment is on the moving party, and a court must resolve any doubts as to the existence of disputed, material facts against the moving party and view all evidence in the light most favorable to the party opposing the motion. *Adickes v. Kress and Co.*, 398 U.S. 144, 158-59 (1970). Nonetheless, where the entire record could not "lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court wrote:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against

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1. As petitioner's statement of the case acknowledges, the arbitrators hearing this case also found in favor of the respondent.

> the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the moving party's case necessarily renders all other facts immaterial. Id. at 322-23 (1986). (Emphasis supplied)

In this case, petitioner not only had adequate time for discovery, but had a three day trial on the merits before three arbitrators, and was able to cross examine all witnesses at length. Nonetheless he was unable to establish any evidence of pretext, as more fully discussed below.

In another decision, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986), this Court noted that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. Only a *genuine* issue of *material* fact will preclude the grant of summary judgment. *Anderson* defines a material fact as one which "might affect the outcome of the suit under the governing law . . ." *Id.* at 248. A "genuine" dispute of material fact exists only

> ". . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The *Anderson* decision further states that

> ". . . the plaintiff must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment."

Id. at 257 (Emphasis added.)

Therefore, a plaintiff may not defeat summary judgment by simply claiming, as here, that one of the persons, whose recommendation was sought, used ethnic slang in another context and to another person. This evidence is

insufficient for a reasonable fact finder to return a verdict for petitioner.[2]

Petitioner asks this Court to review his case because, in his view, the court of appeals misconstrued the facts; however, this Court has stated that it does not ". . . grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *See also Superintendent v. Hill*, 472 U.S. 445, 460-461 (1985) (dissenting opinion by Justice Stevens)

The facts relied upon by both courts below were undisputed and material, *i.e.*, there was an economic need to reduce the salaried workforce, two officials determined which supervisors would be demoted to the hourly ranks, and the decision was based on written performance evaluations (plaintiff ranked lower than his peers), and recommendations by superiors (all ranked plaintiff lowest). As more fully set forth below, there is no inconsistency in the evidence, and accordingly no basis to find that petitioner can raise a material issue of fact to establish that defendant's explanation is unworthy of credence.

Thus, this case does not present issues which warrant the exercise of discretionary review by this Court.

B. The Court Should Not Exercise Its Discretion to Review Because the Lower Courts Fully Considered And Correctly Decided the Issues

Another reason why this Court should decline review is that the district court properly granted summary judgment in favor of respondent, and the court of appeals properly affirmed this decision.

Petitioner asserts that there were five factual findings relied upon by the court of appeals which are "unsupported by the record." However, in his attempt

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2. This case was determined to be a non-jury case under Title VII to be decided by the Court.

to thus create a material issue of fact, petitioner cites parts of the record which, if read in context, do not put in issue the facts relied upon by the lower courts. They are not, under the *Anderson* standard, genuine issues of material fact upon which a reasonable fact finder could return a verdict for petitioner.

More specifically, petitioner first asserts that the court erred in finding that Martin had not made the decision. Petitioner relies on testimony by Luthar that he consulted Martin. Indeed, Luthar did consult Martin. But petitioner ignores the record evidence of both Mischisen and Luthar that although they consulted supervisors, the decision was made by them. Luthar testified that they looked at performance appraisals and considered the input from Guerra, Flaska, Martin, and Pinckney, but that he and Mischisen "had the ultimate decision." (450a) Luthar specifically testified that of the factors utilized by them, the "performance of the individuals was a key element" and by performance he said he meant the ratings in the performance appraisals. (450a).

Secondly, petitioner claims the court of appeals erred in its statement that the appraisal of Martin was consistent with the appraisal of Pinckney, a black. However, the evidence is clear that the appraisals were consistent. Luthar testified that as to petitioner's mechanical ability, Pinckney told him petitioner "was not up to par with the rest of the individuals, it was good but not as good." (441a). Pinckney confirmed that he so told Luthar. He was asked this question very specifically:

> Q. Mr. Pinckney, how does Mr. Ramos' mechanical abilities compare with the other mechanical abilities of the other maintenance foremen?
>
> A. I would rate him as good as opposed to very good in most cases with respect to the other mechanical foremen.

. . . .

> Q. "Okay, now did you tell Mr. Luthar that Mr. Ramos' mechanical abilities were not as good as the mechanical abilities of the other mechanical maintenance foremen?"
>
> A. I did

(266a-267a)

Pinckney then went on to testify that Luthar had asked him to compare petitioner's mechanical ability with the others and that was part of the conversation he had with Luthar (267a). Pinckney also testified that Ramos could not do the job of four of the other maintenance foremen in his unit (282a). Thus, it cannot be said that Pinckney was not consulted or that he gave petitioner a ranking that was inconsistent with Martin's ranking. In essence, they both told Luthar that petitioner was not as good as the other foremen in his mechanical abilities. It should also be noted that Sutton's written appraisal of Ramos was totally consistent with rankings of Ramos by both Martin and Pinckney.

Thirdly, petitioner asserts that the court of appeals' opinion was based on an erroneous finding that Martin only once used ethnic slang with another Hispanic. There is nothing in the decision that would in any way indicate that the number of times Martin used ethnic slang was a material issue. The material issue was whether Martin's use of ethnic slang could support an inference that Bethlehem decision makers acted for reasons of national origin. The court concluded that no such inference could be drawn.

Fourthly, petitioner asserts that the court of appeals believed petitioner had poor performance evaluations. The evidence is uncontradicted. Petitioner had a written appraisal of "good" by Sutton, his supervisor, whereas the other foremen in his unit had "very good,"

a higher rating. (451a) Pinckney concurred in the appraisal of petitioner, both on the written form and in his testimony. Nowhere was it ever asserted by respondent that petitioner's performance was rated as "poor," but only that petitioner had evaluations that were lower than those to whom he was compared. It is in this context that the Court reiterated the non-discriminatory business reason for the Ramos demotion.

And lastly, petitioner asserts that the court of appeals erroneously relied upon a finding that Martin "was *disciplined* for his one racial slur." (emphasis supplied) In fact, the court of appeals in its decision stated that the record disclosed that "Bethlehem *reprimanded* Martin for the remark." (emphasis supplied) And indeed, the evidence of record is that the company policy is against the use of such language and, when Luthar learned of it, he investigated the matter, reprimanded Martin and sent a memorandum to all section supervisors reminding them that the use of such language was not permissible (149a-150a, 208a, 484a-496a). Further, whether Martin was reprimanded as opposed to disciplined is hardly a genuine material issue of fact.

Petitioner's mischaracterizations notwithstanding, the record supports the district court's determination that respondent is entitled to judgment as a matter of law as petitioner did not demonstrate that there is reason to disbelieve the nondiscriminatory business justification offered for his demotion.

Petitioner argues that an employer cannot prevail on summary judgment in a race/national origin[3] discrimination case if the evidence shows that a "flagrant racist" made the disputed employment decision. This argument must fail because the evidence does not establish such facts. First, it is not true that the record shows that

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3. In the lower courts, petitioner alleged only a claim for national origin discrimination. To the extent he now asserts race discrimination, that issue has been waived.

William Martin was a "flagrant racist." More importantly, as discussed above, it does not show that he was the one who decided to demote petitioner.

The evidence establishes that Mr. Martin was only one of four supervisors in the Coke Ovens who made recommendations to Messrs. Mischisen and Luthar about which salaried employees should be demoted as part of the reduction in the workforce. Mr. Martin was not the decisionmaker in this case; he offered his opinion to the decisionmakers, Mischisen and Luthar, that petitioner was the least capable of the maintenance foremen. Mr. Pinckney, petitioner's African-American supervisor, concurred in the evaluation of petitioner's mechanical skills.

William Martin testified that he had jokingly *exchanged* ethnic slang with a Hispanic named Nelson Matos. He emphatically denied using ethnic or racial slang in a derogatory or malicious manner. Petitioner did not produce Mr. Matos or any other witness or evidence to contradict Martin's testimony that he had used such language only in well-understood jest. Indeed, petitioner did not testify that he had ever heard Martin use ethnic slang.

The complaint in this case does not allege a violation of Title VII for national origin harassment or for a "hostile work environment;" therefore, the evidence concerning Mr. Martin's use of ethnic slang is presumably offered as anecdotal evidence of respondent's discriminatory intent in demoting petitioner. Given the facts of this case, however, this evidence is not sufficient to allow petitioner to carry his ultimate burden of proof to show that respondent's explanation for petitioner's demotion is pretextual.

In *Barber v. International Broth. of Boilermakers*, 778 F.2d 750, 761 (11th Cir. 1985), the court wrote that ". . . the mere utterance of an ethnic or racial epithet is insufficient to carry the ultimate burden of proof [in a

Title VII race discrimination case]." Similarly, in *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990), the court of appeals affirmed summary judgment in an age discrimination case, finding that evidence that the decision maker had said that he promoted a younger employee because he was "a bright, intelligent, knowledgeable young man" was not enough to carry plaintiff's burden on his claim of discriminatory failure to promote. *See also Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 559-560, n. 6 (8th Cir. 1989) (a sexist comment is not sufficient to demonstrate that plaintiff's gender was a determining factor in the decision to discharge her).

Because the petitioner failed to produce evidence establishing that respondent's explanation for his demotion was pretextual, the grant of summary judgment was proper in this case. As this Court observed in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), summary judgment is appropriate against ". . . the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and which that party will bear the burden of proof at trial."

Petitioner mistakenly likens his case to *Price Waterhouse v. Hopkins*, ____ *U.S.* ____ , 109 S.Ct. 1775 (1989). The instant case is not a "mixed motive" employment discrimination case since it is not ". . . a case *admittedly* involving both [legitimate and discriminatory] kinds of considerations." Id. at 1789. (emphasis added) In the Price Waterhouse case, the evidence established that the decision to deny partnership to plaintiff was based in part on several partners' comments that resulted from sex stereotyping. For example, the partner who told Ms. Hopkins of the company's decision to place her candidacy for partnership on hold advised she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 1782.

By contrast, in this case, there is not any evidence that at the time they demoted plaintiff Messrs. Mischisen and Luthar knew anything about Mr. Martin's use of ethnic slang. Certainly, there is not any evidence that national origin stereotyping played any part in the several evaluations of petitioner's skills or the final decision to demote him. Accordingly, the *Price Waterhouse* decision is not relevant to the analysis of this case.

VII. CONCLUSION

Petitioner had ample opportunity during discovery and at the three days of the arbitration hearing to develop any genuine issue of material fact upon which a jury or fact finder could reasonably find for petitioner. That he has not done so is established by an analysis of the record which clearly supports the decisions of the district court as well as the Court of Appeals for the Third Circuit.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

March 19, 1990
DATED

/s/ Dona S. Kahn

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